

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MAURECE KAVEL,

Petitioner,

v.

Civ. No. 09-958 WJ/RLP

ANTHONY ROMERO, Warden, *et al.*,

Respondents.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION¹

1. THIS MATTER comes before the Court on Respondents' Motion to Dismiss. Respondents contend that Petitioner has filed a second or successive petition without leave of the Tenth Circuit Court of Appeals. Pursuant to 28 U.S.C. § 2244 of the Antiterrorism and Effective Death Penalty Act, "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." § 2244(b)(1).

2. Petitioner has previously filed a § 2254 petition, *see Kavel v. Tapia, et. al*, Civ. No. 07-0508 MV/LFG. In that proceeding, Petitioner alleged a violation of his constitutional rights for being tried while mentally incompetent. *See* Civ. 07-0508 [Doc. 1]. Petitioner raises the same claim in the proceeding. *See* Civ. 09-958 WJ/RLP [Doc. 1]. This claim, now being twice presented, constitutes a second or successive petition and therefore should be dismissed. § 2244(a) & (b)(1). *In re Cline*, 531 F.3d 1249, 1251-52 (10th Cir. 2008).

¹ Within ten (10) days after a party is served with a copy of the Magistrate Judge's Report and Recommendation (R&R) that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to the R&R in the United States District Court. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the R&R. If no objections are filed, no appellate review will be allowed.


3. However, Petitioner raises another claim that has not been previously presented to the federal district court. Petitioner states that he has received incorrect credit for the time he has served. Pursuant to § 2244(2)(B)(i) this claim should be allowed. Accordingly, the Court has requested that Respondents file an Answer to address this claim.

4. In what the Court construes Petitioner's Response to the Motion to Dismiss, Petitioner filed a "Motion Amending Habeas Corpus" and a Motion to Deny Respondents' Response. In the first Motion, Petitioner admits he had submitted one claim previously, but argues that his sentencing has never been submitted. In the second Motion he makes much the same argument.

RECOMMENDED DISPOSITION

I recommend that Respondents' Motion to Dismiss [Doc. 8] be granted as to Petitioner's claim that his constitutional rights were violated when he was tried while mentally incompetent because this constitutes a second or successive petition; and I further recommend that Respondents' Motion be denied as to the issue of served-time credits.

I further recommend that Petitioner's Motion Amending Habeas Corpus [Doc. 13] be denied as moot and that Petitioner's Motion to Deny Respondents' Response [Doc. 14] also be denied as moot.


Richard L. Puglisi
United States Magistrate Judge